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ABSTRACT

Court decisions in 1988 expanded the power of school boards to set policies regarding the operation of the public schools. Cases are discussed under the following sections: (1) public school assignment, tuition, transportation, home instruction, and compulsory attendance; (2) private and parochial schools; (3) substantive rights of students, including search and seizure, and First Amendment religious and freedom of expression rights; (4) sanctions for student misconduct including suspensions, expulsions, and corporal punishment; and (5) desegregation, including cross-district remedies, desegregation plan oversight, and attorney's fees. (MLF)

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PUPILS

Henry S. Lufler, Jr.

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INTRODUCTION

A United States Supreme Court decision involving student expression[1] and one addressing charges for bus transportation to school[2] were handed down in 1988. Both serve as evidence that the Court is willing to expand the power of school boards to set policies regarding the operation of the public schools at the expense of student rights.

In addition to ruling in favor of the school defendants in the expression case, the Court went on to create a broad definition of what constitutes the pedagogy and curriculum of a school, over which officials retain sole

1. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).
2. Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).

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control. The expression opinion had an immediate impact on several subsequent 1988 cases, including one district court decision that affirmed the right of a school board to remove Chaucer from a humanities course curriculum because of its sexual vulgarity.

The attempts by school officials to limit drug use and sales also continued to be a source of litigation in 1988. Search and seizure issues were raised in some of the cases while another set argued the severity of suspension and expulsion penalties. Schools continue to prevail in a high percentage of all these cases, unless the drug use or sales occurred outside of the school and away from school activities.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Challenges to state statutes regulating school attendance are filed by parents who seek to enroll their children in schools other than the one they were assigned, or by school districts that wish to avoid paying the tuition for a district student to attend school elsewhere. While these challenges generally are made on constitutional grounds, courts most frequently decide such cases using narrow statutory interpretations.

The 1988 tuition and assignment cases all were heard by state courts. The Supreme Court of Arkansas heard a challenge made by a local school district to a statute that permits the children of public school teachers to attend school where the parent taught, even if the parent lived outside the district.[3] The teacher's school system argued that this statute violated the equal protection clauses of the federal and state constitutions because it conferred a benefit on teachers that was not available to other classes of workers.

The Arkansas court rejected the district's argument, using a rational relationship analysis. The court found that the statutory provision served a rational state purpose by aiding in recruiting and keeping teachers. While the district argued that enrollment pressures in the district receiving such students should be considered, the Arkansas court concluded that this was an argument more properly directed to the legislative branch.

The Supreme Court of Nebraska heard a challenge to that state's statute regarding the level of tuition that can be assessed to school districts without high schools whose students attend secondary school in an adjoining district.[4] The statute sets standards for the tuition to be charged, allowing the state board to set the maximum tuition but permitting the receiving district to lower the tuition to a level no lower than the per-pupil

3. Love v. Hill, 759 S.W.2d 550 (Ark. 1988).
4. Ewing v. Scotts Bluff County Bd. of Equalization, 420 N.W.2d 685 (Neb. 1988).

cost of instruction in the district. A lower court had found that the statute provided insufficient guidance to receiving districts on the standards to be used when districts wanted to reduce the state-set tuition.

The Nebraska high court upheld this portion of the lower court's decision, but disagreed with the rest. After holding that the offending portion of the statute could be severed from the remainder, the court went on to decide that the state board could set a higher level for tuition than the annual per-pupil cost in the receiving district. Disagreeing with the lower court on this point, the state high court observed that receiving districts had made capital investments in their schools that would permit the additional tuition.

A South Carolina appeals court heard a challenge to a statute that permits parents to enroll their children in adjoining school districts if the distance to the school outside the child's district is shorter than the distance to the one the child normally would attend.[5] The district attempted to institute a policy that it would pay for tuition in such cases only if the difference in the distance exceeded five miles. The appeals court concluded that local districts were not permitted to alter the literal interpretation of statutes by adding conditions.

A similar statutory dispute arose in New York, where that state's law permits parents with contiguous property in two school districts to select the district where their children might be educated. In this instance, parents purchased 0.1 acre in the next district, causing the school district boundary to pass through the combined property. The receiving district objected, but the appeals court held that the motivation behind the purchase was irrelevant and that a clear reading of the statute compelled the admission of the children.[6]

Appeals of local board assignment decisions can be made to state superintendents in a number of states. Such an appeal occurred in a South Dakota assignment squabble that was marked by clerical errors leading to erroneous findings of fact during the administrative appeal.[7] A local district challenged the state superintendent's order requiring them to admit a student, using both technical and state constitutional grounds. The South Dakota Supreme Court rejected both of the defendant's approaches, holding that the superintendent had broad statutory powers in such cases and that the superintendent had not abused his power in the case, even though some of his findings were based on untrue assertions.

An Arizona statute permits children to live with their grandparents or other relatives and to attend school in the relative's district if their

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5. Smith v. Wallace, 369 S.E.2d 657 (S.C. Ct. App. 1988).
6. Crowe v. MacFarland, 525 N.Y.S.2d 429 (App. Div. 1988).
7. Finck v. Northwest School Dist. No. 52-3, 417 N.W.2d 875 (S.D. 1988).

"emotional health" is best served by the placement. The relative need not be the formal guardian of the student. A student who had been abandoned by her mother and whose father was unknown sought admission to the Phoenix school nearest her grandmother's house where she was living. She was denied admission. Without deciding whether the district had willfully ignored the statute, the appeals court ordered her admitted under the "emotional health" exception.[8]

A Michigan appeals court used a rational relationship test to affirm a local board policy regarding attendance at two high schools in the district.[9] The policy was established to help balance enrollments in the two schools and required students in the low-enrollment school to attend that school but gave students in the high-enrollment school the chance to transfer. The appeals court rejected equal protection claims made by the parents and found that the policy had a rational basis because it was directed at reducing the effects of overcrowding. The parents filed suit because their daughter lost the opportunity to train with a particular swimming coach at the school she wished to attend.

Transportation

Two cases challenging the use of fees for the provision of school bus service to children living in rural areas were heard in 1988. In the first, the United States Supreme Court rejected an equal protection attack on a North Dakota statute that permitted the fee levy. In the second case, a California appeals court sustained a similar challenge, holding that a fee for bus service violated that state's constitution.

Similar issues were present in both cases. The two courts each examined claims by the plaintiffs that the fee statutes should be subjected to strict or heightened scrutiny because classes of citizens based on wealth were created by the laws. Each was also asked to rule that the fee resulted in withholding an important governmental benefit on the basis of economic status,[10] thereby violating the equal protection clause. Finally, both courts were asked to apply *Plyler v. Doe*,[11] where the Supreme Court held that a "permanent underclass" of uneducated citizens would be created if the children of undocumented aliens were not educated, to the busing fee question.

Kadrmas v. Dickinson Public Schools[12] involved a challenge to

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8. Sleeseman v. State Bd. of Educ., 753 P.2d 186 (Ariz. Ct. App. 1988).
9. Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505 (Mich. Ct. App. 1987).
10. Smith v. Bennett, 365 U.S. 708 (1961) (certain criminal appeals cannot be prevented with a filing fee requirement); Lindsey v. Normet, 405 U.S. 56 (1972) (appeals in certain landlord-tenant cases cannot contain an excessive bond requirement).
11. 457 U.S. 202 (1982).
12. 108 S. Ct. 2481 (1988).

North Dakota's statute[13] that permits nonreorganized school districts to charge a fee for transportation services. The statute does not allow a charge in districts where school consolidation has occurred. Part of the purpose of the challenged law, in fact, was to encourage school reorganization by requiring free transportation for school children if reorganization referenda were adopted. In 1987, the North Dakota Supreme Court was evenly divided on the question of whether the statute violated the state's equal protection clause, letting stand a lower court ruling that it did not.[14]

The plaintiff's daughter, Sarita, attended school in a nonreorganized district. The Dickinson school system assessed her parents a $97 annual charge for her transportation. The family lived sixteen miles from her school and had an annual income that was at or near the poverty level.

The Supreme Court upheld the fee by a five-to-four margin, rejecting the plaintiff's argument that the denial of free transportation was a denial of the right to an education. While the plaintiffs explicitly urged that the statute be reviewed in the light of the *Plyler* decision, the Court rejected the comparison, holding that the district had no legal mandate to provide transportation and therefore there could be no requirement that it be provided for free. The majority also held that it did not violate the equal protection clause for the state to require free transportation in reorganized districts but not in Dickinson, holding that the statutory distinction served the legitimate state purpose of encouraging reorganization.

Two dissents were recorded, with Justice Marshall, joined by Brennan, arguing that since the statute discriminated on the basis of economic status it violated the equal protection clause. Justice Stevens, joined by Blackmun, took a narrower view, holding that the statute no longer served a rational purpose since it had been in place for many years and had not led to reorganization in communities like Dickinson, serving now only as an "obstacle in the paths of poor children." Following this approach, the dissent concluded that the challenged statute would fail the rational relationship test.

A California appeals court heard a challenge to that state's statute that permitted the charging of transportation fees, a fee levied by only sixty of the state's 1,049 school districts.[15] Unlike the North Dakota statute, California explicitly provided for a waiver when parental income fell below certain guidelines. The waiver, however, did not persuade the court that the policy was advertised to all who might benefit from it, nor

13. N.D. Cent. Code § 15-34.2-06.1 (1981 and Supp. 1987).

14. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987). *See* The Yearbook of Education Law 1988 at 70-1.

15. Salazar v. Honig, 246 Cal. Rptr. 837 (Ct. App. 1988).

was it clear that the fee would not be a significant hardship to those whose income barely surpassed the cutoff.

Using state precedents, the appeals court concluded that the fee violated the California Constitution, establishing classifications based on wealth and violating the state requirement of a free education. Using strict scrutiny analysis, the law was struck down over objections by the state defendants that local districts who charge a fee should be added as parties to the case to offer a defense. Attorney fees also were awarded to the plaintiffs.

Home Instruction

Home instruction cases present a clash between two deeply held values, the right of parents to determine the education to be received by their children and the right of the state to ensure that all children receive at least a basic education. The 1988 home instruction cases, considered as a group, raised every conceivable argument on behalf of parental rights. Nevertheless, as seen over the years in these cases, courts remain reluctant to strike down state supervision or regulation of home instruction programs. The 1988 litigation also was characterized by an unusual feature, with the same attorney representing the parents in four of the six cases.

In a case raising the full panoply of home instruction issues, New York plaintiffs were unable to convince a federal court that the state statute setting minimum standards for home instruction was unconstitutional.[16] New York's statute requires home instruction to be "essentially equivalent" to that offered in the public schools. Local school officials are charged with making the equivalence determination, and parents must submit a calendar, curriculum, and test scores for older children to assist in the process. Also at issue in the case were on-site visits by local school officials that were a part of the approval process.

Among the challenges raised by the plaintiffs were allegations that the statute was overly vague, that it violated the establishment and free exercise clauses of the first amendment, and that the visits violated the right to privacy guaranteed by the fourth and fourteenth amendments. At the outset, the court also had to address complicated jurisdictional issues, because the parents were involved in varying degrees with state court actions. One family, for example, had been found not to have neglected the education of their children in state proceedings, though the court in that action expressed concern about the ability of the parents to educate the children as they became older.[17] The district court con-

16. Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988).
17. *In re* Blackwelder, 528 N.Y.S.2d 759 (Sup. Ct. 1988).

cluded, however, that the issues presented by two of the three plaintiffs were ripe for consideration.

The federal court rejected each of the plaintiffs' claims. The court held that local determination of the quality of a home instruction program was not, per se, overly vague, and that state curriculum standards provided an adequate guideline for the review. The court also mirrored other previous cases in this area by holding that the slight loss of religious rights inherent in the regulations was justified by the compelling state interest that all children receive a basic education. The court added that the statute represented the least restrictive means of ensuring that the state's interest was maintained. On the privacy question, the court refused to find that a visit scheduled at the parent's convenience and confined to the area in the home where instruction took place represented an intrusion so substantial as to violate the constitution.

A new home instruction issue was raised in this case and in one from North Dakota that follows. The plaintiffs argued that local school officials were "biased decision-makers" because their decisions arguably affected the per-pupil state aid received by the district. The district court, characterizing this claim as "nothing more than conclusory," held that administrative and judicial review of a local administrator's decision was adequate to protect parents against possible abuse.

The court awarded summary judgments to the defending school districts on all issues. It refused, however, to award fees to the districts, holding that none of the plaintiffs' claims sunk "to the level of frivolity" necessary to meet the requirements of 42 U.S.C. section 1988.[18]

North Dakota statutes require that home instruction be provided by a certified teacher. The statute was upheld by the state supreme court in 1986 with the court holding that the requirement was one of the least restrictive means of ensuring that children educated at home received an adequate education.[19] Similar arguments to those rejected by the court were again advanced in two 1988 cases, and again the plaintiffs' arguments were found to be unpersuasive.

In the first case, the plaintiffs argued that a state task force had developed less restrictive methods of reviewing home instruction programs, demonstrating that the certification requirement was unnecessary. The North Dakota high court, however, refused to accept this reasoning after noting that the state legislature had declined to change the statute.[20] The court also rejected the argument that local school administrators had a financial stake in the monitoring of home instruction

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18. The 1976 Civil Rights Attorneys' Fees Award

19. State v. Patzer, 382 N.W.2d 631 (N.D. 1986). *See* The Yearbook of School Law 1987 at 83.

20. State v. Anderson, 427 N.W.2d 316 (N.D. 1988).

programs, holding that local monitoring was a ministerial function that required no subjective judgments.

The second North Dakota case presented a different issue because a lower court judge had found the parents "not guilty" of a compulsory attendance school law violation, holding that the state statute violated their right to free exercise of religion. The plaintiffs argued that a state appeal in the case constituted double jeopardy because they were being tried a second time for a criminal violation. The supreme court held, however, that the lower court decision represented a dismissal of the charge, rather than a verdict, and that the state properly could appeal.[21] The court went on to reject again the first amendment claims advanced by the plaintiffs. In both North Dakota cases, one justice issued a minority opinion to indicate that he had abandoned his court's 1986 reasoning regarding certification as comporting with freedom of religion.

The Eighth Circuit Court of Appeals heard a case challenging the constitutionality of the Arkansas Home School Act.[22] Arkansas has a permissive statute regulating home instruction, with the annual testing of students educated at home as its central provision. Parents select the test to be administered from a list of national tests prepared by the state. The test is given by a test administrator, with the parents present if they wish. The plaintiffs argued that the test violated their free exercise rights and the equal protection clause, since no testing is required of students who attend private schools in the state.

The appeals court rejected both arguments in a brief decision. The court found that the testing scheme represented the least restrictive way for the state to monitor home education and that it had little impact on the plaintiff's religion rights. The equal protection argument also was dismissed, through the application of a rational relationship test, with the appeals court finding that the state had good reason to assume that private school attendance provided a greater guarantee of educational progress.

Small fundamentalist Baptist church schools in Iowa challenged that state's equivalent instruction requirement, and a federal district court ruled in 1985 that the term, which was not defined in the statute, was unconstitutionally vague.[23] While also addressing other issues that were involved in the case, the Eighth Circuit remanded the equivalent instruction issue to the district court for reconsideration in light of new state regulations that became effective early in 1986.[24] The new standards

21. State v. Melin, 428 N.W.2d 227 (N.D. 1988).
22. Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988).
23. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985).
24. Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987).

specify that instruction must be offered by certified teachers and must fulfill certain other minimum requirements.

The district court heard from the parties in the case, with the plaintiffs continuing to argue that the new standards were vague. The court disagreed, ruling that private schools had adequate notice of the standards and that they contained sufficiently explicit criteria.[25]

Compulsory Attendance

Compulsory attendance cases in 1988 focused on two quite different issues: the use of contempt of court and subsequent detention of juveniles to force them to attend school, and challenges to state laws requiring students to be inoculated before attending. Both areas had been relatively quiet until this year.

The Supreme Court of California, sitting en banc, heard a challenge to the use of a lower court's contempt powers.[26] The student had been ordered to serve forty-eight hours in a locked facility after he was found to be in contempt of court for violating a judge's order that he attend school. While other state courts have upheld the use of such penalties, to be administered only to juveniles who were under the protection of the state and only after a hearing, the California court had not previously addressed the issue.

An examination of legislative intent in several California juvenile statutes convinced the court that the legislature had never prohibited the practice. Observing that the holding of juveniles for contempt, always in settings away from other offenders, should "be used sparingly and with the utmost sensitivity,"[27] the court explicitly adopted four qualifications on a juvenile court's contempt powers that were developed by the Wisconsin Supreme Court in a 1983 decision.[28] Contempt could be used only when (1) the juvenile understood the order and had been given sufficient time to comply with it, (2) the violation of the court order was egregious, (3) less restrictive alternatives were considered and found to be ineffective, and (4) special confinement conditions were arranged.

A Wisconsin appeals court heard a challenge brought on behalf of a minor who had been found in contempt of court and institutionalized for truancy.[29] Unlike the California case just discussed, the student had been assigned to the facility for an indeterminant period until it was demonstrated that the student was attending school on a "regular basis." This was overly vague for the court, which held that the unspecified

25. Fellowship Baptist Church v. Benton, 678 F. Supp. 213 (S.D. Iowa 1988).
26. *In re* Michael G., 747 P.2d 1152 (Cal. 1988).
27. *Id.* at 1161.
28. *In re* D.L.D., 327 N.W.2d 682, 689 (Wis. 1983).
29. *In re* T.J.N., 416 N.W.2d 632 (Wis. Ct. App. 1987).

sentence amounted to a punitive sanction that could be imposed only after filing a complaint and conducting a hearing. The court also ruled that the Wisconsin statute requiring an educational evaluation of the student before the filing of truancy charges had not been followed.

The inoculation statutes of the states vary somewhat, but all contain some provision for the exclusion from the requirement for religious reasons. There generally is also some provision for the exclusion of uninoculated students during times of epidemic. Courts further have been reluctant to expand the religious exemption to students whose families have "religious-type" faiths, but who do not belong to an organized sect. This last issue was again tested in a case that reached the Second Circuit.[30]

The plaintiff in the case was a member of the Universal Life Church, a mail-order ministry in which one can become a minister or bishop upon the payment of a fee. The plaintiff also claimed that the family's personal view held that inoculations were contrary to the "genetic blueprint intended by nature," and that this view qualified them for an exemption under New York law. The appeals court, while observing that New York courts had construed the religious exception quite broadly, was unwilling to find that the plaintiff's views were religious in nature. Instead, the court likened them to strong, secular convictions. Likewise, after citing a series of cases that had characterized the Universal Life Church as a "tax dodge," or worse, the court refused to find that the organization was a religious group qualifying for the exemption.

Arizona's liberal inoculation statute allows children to attend school without vaccinations, but requires their immediate removal upon the declaration by a county health officer that an epidemic is present. This process was followed after an outbreak of measles in Maricopa County. Several parents brought suit, however, alleging that their rights had been violated because the epidemic had been declared before lab tests had confirmed the presence of measles in the school, though it was present in the community.[31]

After a lower court ruled in favor of the parents, an appeals court considered the case and reversed the lower court. Observing that almost 100% of those who are not inoculated acquire the disease when exposed to it, and that those who have it may acquire more life-threatening subsequent diseases, the appeals court found it perfectly reasonable that the health department would not want to wait for two weeks pending the return of laboratory tests that would confirm the presence of the outbreak in the school. Both religion and privacy arguments advanced by the plaintiffs were rejected.

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30. Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2d Cir. 1988).
31. Maricopa County Health Dep't v. Harmon, 750 P.2d 1364 (Ariz. Ct. App. 1987).

Finally, a New York appeals court heard an appeal from a school district that did not want to pay legal fees assigned by a lower court to plaintiffs who successfully convinced the court that they qualified for a religious exemption from that state's inoculation requirement.[32] The section 1988 fees were awarded in the face of the defendant's argument that "special circumstances" should preclude the award. The district argued that it was following a good faith, literal reading of the law. The appeals court refused, however, to find that this good-faith defense qualified the district for the exception to section 1988.

PRIVATE AND PAROCHIAL SCHOOLS

Cases involving private and parochial schools are reported in the other sections of this chapter that discuss home instruction and first amendment religious rights. This section presents cases that deal with private school transportation, state law, and tuition contract issues. Two such cases were reported in 1988, focusing on a state transportation statute and alleged racial discrimination in the treatment of Philadelphia parochial-school students.

Minnesota's Equal Transportation Act allows school boards to provide student transportation to nonpublic schools outside the district if "the transportation is to schools maintaining grades or departments not maintained in the district or if the attendance of such children at school can more safely, economically, or conveniently be provided for by such means."[33] Parents of children enrolled in Catholic schools outside their district were charged $575 per student for bus service and filed suit in an attempt to obtain the service at no cost. They claimed that the schools to which they sent their children had unique departments and that they also qualified under the safety provision of the statute.

A Minnesota appeals court disagreed with the plaintiffs' reading of the statute.[34] While the parochial schools that served the children contained unique programmatic features, the court refused to find that these constituted "departments" under the terms of the statute. The court also rejected the safety argument, observing that the district had agreed to provide the service and that it was the charge that was in dispute.

The plaintiffs also raised an equal protection claim. This too was rejected, with the court observing that the plaintiffs had not introduced any evidence that other similarly situated private school students in the state were receiving the transportation for free.

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32. Campain v. Marlboro Cent. School Dist., 526 N.Y.S.2d 658 (App. Div. 1988).
33. Minn. Stat. § 123.78 1(a) and (b) (1986).
34. Eldredge v. Independent School Dist. No. 625, 422 N.W.2d 319 (Minn. Ct. App. 1988).

Parents of students enrolled in Philadelphia parochial schools filed a complaint with the state human relations commission alleging mistreatment based on race. The complaint cited claims of disproportionately harsh discipline meted out to minority students, harassment based on race, and offensive remarks directed at the students. When the commission began to investigate the complaints, under the procedures contained in the state human relations act, suit was filed by the archdiocese arguing that the schools fit the act's "distinctly private" exception and that the investigation exceeded the commission's jurisdiction. The case arguing this point was heard by the Commonwealth Court of Pennsylvania.[35]

For the court, the narrow question it considered was whether the schools constituted a "public accommodation" within the statute. The definition of such accommodations within the statute was lengthy, but did not include parochial schools. Given the detailed listing, the court ruled that the state commission could not add other institutions to the act's coverage without a change in the statute. The court therefore ordered the investigation of the complaints to stop.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

A large number of search and seizure cases continue to be recorded, with most focusing on the propriety of searches that produce evidence of drug use or sales. School defendants continue to prevail in cases where a "reasonable suspicion" of illegal activity is present. The definition of reasonableness is controlled by the United States Supreme Court decision in *New Jersey v. T.L.O.*[36] *T.L.O.* involved the search of a high school student's purse that led to the discovery of marijuana and evidence that the student had been selling the drug in her school. The Court found the search to be reasonable, establishing the standard that the search methods used must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[37]

In only one 1988 case was a school search found to be unreasonable.[38] A Virginia middle school princial asked teachers to search students in their classes on several occasions, requiring students to empty the contents of their pockets, bookbags, and purses onto their desks. In one search the object was "Walkman" radios, which were prohibited in

35. Roman Catholic Archdiocese of Philadelphia v. Human Relations Comm'n, 548 A.2d 328 (Pa. 1988).
36. 469 U.S. 325 (1985).
37. *Id.* at 336.
38. Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987).

school. On another occasion the search was aimed at uncovering marijuana after the principal detected marijuana smoke in a vestibule. Radios were confiscated in the first search and no drugs were found in the second.

The district court granted a summary judgment for the student plaintiffs, holding that both searches violated the fourth amendment. Absent any particularized suspicion, the general searches were found to be unreasonable. The court criticized school officials for failing to take a number of obvious steps in an attempt "to narrow the field of suspects." In a subsequent decision, the court ruled that school personnel were protected by sovereign immunity under state law from damage claims arising from the illegal search.[39]

A number of cases in 1988 raised questions about the propriety of searches involving student vehicles and lockers, following tips from other students or some other in-school evidence that a student possessed or was selling drugs. The Supreme Court of Colorado, sitting *en banc*, heard a challenge to a search of a student's car that uncovered a duffel bag containing a large quantity of marijuana.[40] The search of the car resulted from a report given to a police officer that the student had brought marijuana to school with the intent of selling it to other students.

A search of the student was not productive but a search of the car in which the student had been transported to school uncovered the drugs. The Colorado court found the search to be "justified from its inception" because of the tip received and the evasiveness of the student when he was questioned about the means he had employed to come to school that day. The court also refused to find that the security guard who conducted the search was acting as an agent of the police in carrying out the search or that the presence of the police officer, who was in the school on another matter, required that the more rigorous probable cause standard be employed to review the search. Evidence used in the search was permitted in a juvenile delinquency proceeding.

An Anchorage student was found guilty of cocaine possession following a search of his car that was parked outside his high school. A teacher reported that the student appeared to be under the influence of alcohol, and the investigating principal detected alcohol on the student's breath and observed him bumping into furniture when he attempted to walk. The search of the student's car did not uncover alcohol, but two grams of cocaine were found in the ashtray.

The plaintiff's attorney argued that the ashtray search was unreasonable, since alcohol was the substance being sought. An Alaska appeals court disagreed, finding that the failure to uncover the alcohol did not

39. Burnham v. West, 681 F. Supp. 1169 (E.D. Va. 1988).
40. *In re* P.E.A., 754 P.2d 382 (Colo. 1988).

preclude the further search.[41] The student had just returned from an off-campus lunch, but the time period for lunch was so short, the court reasoned, that it was unlikely the student could have reached his current disoriented state through the use of alcohol alone. The possibility that drugs were involved, then, made the search reasonable.

A California student told his principal, "[y]ou can search me if you want to," while denying that he possessed drugs. The principal, who was acting on a student tip, conducted a search that uncovered cocaine in the student's pocket. An appeals court upheld the reasonableness of the search and ruled that the principal was not required to warn the student that the evidence found might be used in a subsequent criminal proceeding.[42] In similar cases in recent years, courts consistently have rejected claims that *Miranda v. Arizona*[43] requires school officials to give the same warning to defendants that would be required of police officers.

A New Mexico high school student reported to a teacher that another student had tried to sell him marijuana. The report led to a locker search and the subsequent discovery of marijuana cigarettes. The search was found to be reasonable by a New Mexico appeals court.[44] In a similar case, Texas school personnel found marijuana in the lining of a student's coat after responding to a student report that he had bought marijuana from the plaintiff. This search was found to be reasonable, and the products of the search led to an adult criminal conviction, with the court holding that *T.L.O.* standards applied to adults as well as juveniles.[45]

A Florida search conducted by a sheriff's department employee working in the school, conducted in the presence of a police officer, led to the discovery of car keys to a vehicle allegedly stolen by a thirteen-year-old student. The student was convicted of juvenile delinquency, and an appeal was made on the ground that probable cause was required for the search. An appeals court sustained the appeal, remanding the case and concluding that the sheriff's employee was not acting as a school official in conducting the search, which was part of a criminal investigation originating outside the school.[46]

School drug tests constitute a search under the terms of the fourth amendment. While few reported decisions have been made regarding drug testing in the school setting, those that do have suggested that some individualized suspicion is required and that totally random drug testing

41. Johnson v. State, 762 P.2d 493 (Alaska Ct. App. 1988).
42. *In re* Corey L., 250 Cal. Rptr. 359 (Ct. App. 1988).
43. 384 U.S. 436 (1966).
44. State v. Michael G., 748 P.2d 17 (N.M. Ct. App. 1987).
45. Irby v. State, 751 S.W.2d 670 (Tex. Ct. App. 1988).
46. F.P. v. State, 528 So. 2d 1253 (Fla. Dist. Ct. App. 1988).

is unconstitutional.[47] An Indiana district court considered a different variety of antidrug program in a 1988 case that reviewed the proposed testing of students as a precondition to participation in high school athletics.[48]

The school's program was constructed such that it avoided some of the issues raised in previously challenged drug-testing programs. The urinalysis test samples were to be gathered without an outsider present as a witness and were to be administered only to athletes and cheerleaders. A positive test result led only to a denial of the right to participate in athletic competitions and had no other disciplinary or criminal consequences.

Substantial expert witness testimony was taken in the case and reported by the court in its opinion. For the court, the testimony led to the conclusion that there were unique health and safety risks that were present for athletes who used drugs that were absent for nonathletes. The "unique identity" enjoyed by athletes also was cited by the court as justification for singling out this group of students. Finally, after reviewing cases that show there is no fundamental right held by students to participate in athletics, as distinct from the right to an education, the court concluded that it would not restrain the proposed program. The case, then, departs from the individualized suspicion standard, but does so after making it clear that the decision applies only to the proposed program.

First Amendment Religious Rights

A variety of interesting religious-rights cases were heard by courts in 1988. The issues litigated included the use of mobile classrooms to provide chapter I[49] services, minutes of silence, Saturday high school graduation ceremonies, prayers offered before band practice, and school dances opposed by local ministers. The right of persons to practice their religion clashed in most of the cases with the constitutional prohibition against state sponsorship of religious activities.

The Eighth Circuit Court of Appeals heard two cases arising from a challenge to the use of mobile classrooms parked on parochial school grounds in which chapter I federally funded remedial education programs were offered to the private school students. The plaintiffs' challenge asserted that the use of the classrooms was a deliberate attempt to

47. *See* Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985), *modified*, 663 F. Supp. 149 (W.D. Ark. 1985); Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

48. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988).

49. The Education Consol. and Improvement Act of 1981, 20 U.S.C. §§ 3801-8 (1982 and Supp. III, 1985).

circumvent the Supreme Court's ruling in *Aguilar v. Felton*.[50] The suit was filed by a variety of school officials acting as individuals and by parents.

Both of the cases heard by the appeals court focused on the standing of the parties rather than on the merits of the constitutional claim.[51] The key issue before the court was whether taxpayers had standing to challenge executive implementation, made through federal rules and policies, of a congressional spending program. The court concluded that such standing was lacking, using two Supreme Court decisions as precedent.[52] The court also dismissed the claim for damages against Secretary Bennett, holding that a "legitimate question" had been posed about the constitutionality of the guidelines he issued, entitling him to qualified immunity.

The appeals court's first decision ended the suit. It was reversed, however, by the same court three months later.[53] The Supreme Court's decision in *Bowen v. Kendrick*,[54] made a month after the first Eighth Circuit decision, led to the reversal. *Kendrick* involved the administration of grants made under a federal family planning act. The Supreme Court permitted a taxpayer challenge to the implementation of the family planning act, a parallel circumstance to the challenge presented to the Eighth Circuit regarding chapter I. The decision was remanded to the district court for a hearing on the use of the mobile classrooms. The court, however, declined to change its ruling dismissing Secretary Bennett as a party in the litigation.

The United States Supreme Court also ruled on an appeal of lower-court decisions that voided New Jersey's law requiring a minute of silence at the start of the school day. First amendment arguments did not play a part in the decision, however. Instead, the Court decided the case on an issue of standing, holding that the plaintiffs who brought the case could not pursue the appeal.[55]

After a refusal by the New Jersey executive branch to support the statute when it was challenged on establishment clause grounds, the case was litigated on behalf of the Speaker of the New Jersey Assembly and the President of the New Jersey Senate. Both individuals who held these positions were replaced, however, before the Supreme Court could consider their appeal. Their successors declined to continue the appeal

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50. 473 U.S. 402 (1985) (federal funds cannot be used to fund public school teachers who provide instruction on private school premises without violating the establishment clause).

51. Pulido v. Bennett, 848 F.2d 880 (8th Cir. 1988).

52. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) and Flast v. Cohen, 392 U.S. 83 (1968).

53. Pulido v. Bennett, 860 F.2d 296 (8th Cir. 1988).

54. 108 S. Ct. 2562 (1988).

55. Karcher v. May, 108 S. Ct. 388 (1987).

and the Court ruled that the original plaintiffs had lost their standing, thereby causing the case to be dismissed.

The Second Circuit heard an appeal of a memorandum decision that Saturday high school graduation exercises violated the free exercise rights of a Jewish student whose sabbath was Saturday.[56] The appeals court concluded, after reviewing cases showing that some loss of religious freedom was inevitable with a variety of state-sanctioned activities, held that the commencement principally was a "social occasion" that therefore could be scheduled on Saturday.

An Arkansas band director who led students in prayer before band practices and concerts precipitated a first amendment lawsuit. A district court found that the prayers violated the establishment clause. The district appealed, arguing that the case was moot because the prayers had ceased and that attorney fees awarded in the case were improper because the teacher's practice had not been approved by the school board. Both arguments were rejected by the Eighth Circuit.[57]

In denying the mootness argument, the appeals court held that there was no evidence that the board would not permit the practice to return, given the fact that the board had been approached by the plaintiffs several times before the suit was filed and had not adopted a policy against the prayers. The failure of the board to act also convinced the appeals court that the lower court's award of fees was reasonable, though the sum was reduced somewhat to omit fees associated with delays sought by the plaintiffs that were attributed to the failure of their attorney to meet court deadlines.

The desire by some students to attend school dances and the belief by some residents of Purdy, Missouri, that dancing was sinful led to a case considered in federal court.[58] Dances were not permitted by school rules, leading to a situation in which proms were bifurcated into two sections, with dancers forced to attend an off-campus portion of the event held without teacher supervision and school sponsorship. The school board also refused to rent school space to a community group so that it could hold school dances and would not allow money raised at an off-campus dance to pay for a class trip.

In testimony offered by school board members, characterized by the court as "not particularly credible," the members denied that fundamentalist religious beliefs in the community were related to their policy. The plaintiffs, however, argued that the rule violated the establishment clause by forcing religious beliefs onto school students and staff. The court employed the test for establishment clause violations found in

56. Smith v. North Babylon Union Free School Dist., 844 F.2d 90 (2d Cir. 1988).
57. Steele v. Van Buren Pub. School Dist., 845 F.2d 1492 (8th Cir. 1988).
58. Clayton v. Place, 690 F. Supp. 850 (W.D. Mo. 1988).

Lemon v. Kurtzman[59] and concluded that the dancing ban had no secular purpose. The court went on to observe that the rule could, in fact, make some impressionable students believe that their religion was inferior, if it was one that permitted dancing. Damages of $1 and attorney's fees were awarded to the plaintiffs.

The terms of the Federal Equal Access Act,[60] designed to permit student-initiated religious groups to function during student activity periods, were argued in a state of Washington district court case.[61] Washington's state constitution permits no "sectarian influence" in the public schools. To comply with this provision, the defending school board permitted only clubs that were related to the school's curriculum to use school facilities. Requests by students to form a Bible study and prayer group therefore were denied. The court concluded that school officials had created a "closed forum" during the activity period by ensuring that only school-related activities would occur. Because a provision of the Act waives its requirements when it conflicts with state law, the court upheld the school's policy and dismissed the plaintiffs' case.

A California appeals court confronted related issues when it heard an appeal of a case resulting from a school principal's refusal to allow a student religious group to distribute flyers and advertise in the senior yearbook.[62] The school board, as in the previous case, had decided it wanted the school to operate under a "closed forum" policy. Only school-sponsored clubs were permitted to meet and use school facilities. The plaintiffs in the case, however, argued that they already used the facilities for informal luncheon meetings that took place in the school cafeteria. They sought to distribute flyers inviting other students to join in prayer and religious discussions.

The appeals court affirmed a lower-court ruling supporting the school board's decision against the distribution and the yearbook advertising. The appeals court found no justification to compel the school to have an open forum, under the Equal Access Act, if it did not wish to do so during the luncheon period. Using the *Lemon* test, the court also concluded that the policy had a secular purpose, avoided entanglement with religion, and neither advanced nor inhibited religion. In dissent, one of the three justices hearing the case felt that the plaintiffs should be left free to distribute "their harmless scraps of paper," suggesting that the establishment clause would not be violated by the distribution.

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59. 403 U.S. 602 (1971).

60. 20 U.S.C.A. § 4071 *et seq* (West 1985).

61. Garnett v. Renton School Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987).

62. Perumal v. Saddleback Valley Unified School Dist., 243 Cal. Rptr. 545 (Ct. App. 1988).

First Amendment Freedom of Expression

The United States Supreme Court's sweeping decision in *Hazelwood School District v. Kuhlmeier*[63] influenced subsequent 1988 expression cases and will have a major impact on school law in the years to come. The case involved the censorship of a school newspaper that had sought to publish articles on teenage pregnancy and divorce. The pregnancy story contained a description of student sexual practices and birth control methods. The school principal deleted the two pages of the paper that contained the stories, doing so after concluding that those who were anonymously quoted in the story could be identified by readers. This, the principal decided, might cause them harm and lead to a subsequent tort action against the school. The defending school district also argued that the paper's content was subject to regulation because the paper was a part of the journalism curriculum.

The Eighth Circuit Court of Appeals rejected the curriculum argument and reached a factual determination that the paper was an open forum for the school, using statements published by the school itself to support the conclusion. The appeals court also applied a material disruption test, drawing on *Tinker v. Des Moines Independent Community School District*,[64] concluding that there was no evidence that disruption would occur were the stories published. Finally, the appeals court concluded that the consent obtained from those appearing in the stories adequately answered the school system's concerns about any invasion of privacy.[65]

The Supreme Court relied on the place of the newspaper within the curriculum in reversing the Eighth Circuit. The Court held, "[e]ducators do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns . . . ."[66] The five-to-three majority established the broadest possible definition of what constituted a school's curriculum, holding that only when school-sponsored expression has "no valid educational purpose" is the first amendment implicated such that judicial intervention would be warranted.

This control is permitted, the Court concluded, to ensure that students learn what the school is attempting to teach, to protect younger students from inappropriate material, and to ensure that individual

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63. 108 S. Ct. 562 (1988).

64. 393 U.S. 503 (1969).

65. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986). *See* The Yearbook of School Law 1987 at 96-7.

66. 108 S. Ct. 562, 571 (1988).

views are not inappropriately attributed to the school.[67] Denying students the opportunity to read about sexuality in their school newspaper was, the Court held, a valid pedagogical goal.

Kuhlmeier's effect was immediately observable in lower-court decisions. A Florida district judge concluded that the decision required her to uphold a school board's decision to remove a book containing works by Chaucer and Aristophanes from the school's humanities curriculum.[68] The works, which were optional readings, were found by the school board to contain a level of "sexuality" that was inappropriate for student readers and offensive to community values. While finding it was "difficult to apprehend the harm which conceivably could be caused" by exposing high school juniors and seniors to the authors, the court nevertheless concluded that it was within the school board's power to take the action.

The Ninth Circuit reviewed a decision addressing a school board's policy requiring prior review of all materials that students intended to distribute within the school. The case was initiated when students were officially reprimanded for distributing an unauthorized newspaper at a senior class barbecue. A district court found the review requirement constitutional, holding that it helped prevent disruption and possible damaged reputations.[69]

The Ninth Circuit reversed.[70] The case was, for the appeals court, distinguishable from *Kuhlmeier* because it involved nonschool-sponsored student writings that no one could associate with school sponsorship or endorsement. Using further language from *Kuhlmeier*, the court found that the paper did not interfere with what the school taught and that it enriched the school environment. The appeals court therefore concluded that the school could regulate the time, place, and manner of distribution, but could not require the approval of materials before they were circulated. The case was, for the court, "unique and ironic" because the school defendants admitted that the paper would have qualified for distribution had the review been requested.

A California appeals court reviewed an April Fools Day issue of a faculty-supervised student newspaper after a principal halted the issue when students refused to delete a story and a picture of five students standing in a school line. The spoof said the female students were waiting to be interviewed for possible inclusion in an issue of *Playboy Magazine*. The principal concluded that the students had not given

67. *Id.* at 569.

68. Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547 (M.D. Fla. 1988).

69. Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987). *See* The Yearbook of Education Law 1988 at 91.

70. Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988).

informed consent to appear in the gag issue, and at least one of the students supported this contention.

The appeals court sustained the principal's action.[71] The case was not an easy one, even though *Kuhlmeier* supported the decision, because California's education code contains a provision that gives student editors of official school publications virtual control over the contents of papers.[72] The appeals court upheld the censorship, however, relying on the conclusion that materials that are defamatory can be removed. This conclusion was reached after a long discussion of defamation cases, with the court finding that only materials addressing public figures were exempt from the ruling.

The appeals court admitted that its decision created a burden on school peronnel, first requiring the drafting of careful procedures and then the making of difficult judgments. The court added that the plaintiff had missed the chance to pursue a "possibly winning" argument by failing to argue on appeal that the spoof could not possibly be considered defamatory by any reasonable reader. This left the school district's defamation defense unchallenged.

The policy of an Illinois school district prohibiting the wearing of earrings by male students was sustained in the face of a free-expression challenge.[73] The policy was formulated to prevent the wearing of gang insignia to school. In upholding the ban, the district court concluded that the antigang rationale was sufficient to sustain the policy in the face of the student's claim that the earring was merely a sign of his "individuality." The court also rejected a gender-based equal protection challenge that centered on the fact that the earring policy applied only to males.

A challenge brought by students who wished to continue the use of a "Johnny Reb" symbol for their school again was before the Fourth Circuit.[74] A district court previously had dismissed the case as frivolous but the Fourth Circuit had ordered the case considered. On remand, the district court supported the principal's decision to end the use of the symbol, which was offensive to black students. In a decision presumably ending the case, the Fourth Circuit upheld the lower court, holding that personal student expression was not curbed by the school's decision to eliminate an unwanted symbol.

Litigation involving the participation of peace activists in "Career Day" activities in Atlanta continued in 1988. The activists were seeking to counter the activities of military recruiters who participated in the school-day activities by having the career of "peace maker" included on

71. Leeb v. DeLong, 243 Cal. Rptr. 494 (Ct. App. 1988).
72. Cal. Educ. Code § 48907.
73. Olesen v. Board of Educ. of School Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987).
74. Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988).

the program. They also sought to distribute materials in guidance offices and on bulletin boards where a wide variety of career-related materials were available. The school superintendent had approved their participation but the action was reversed by the school board following community complaints. In 1987, the Eleventh Circuit upheld a lower-court ruling that the school board had created a nonpublic forum, but that such a forum must be "viewpoint neutral," and remanded the case for a determination about whether the exclusion of the groups was based on the legitimate goals of the program.[75]

On remand, the district court considered the board's action and concluded that the rules it developed for Career Day participation were designed to suppress the point of view being offered by the peace activists.[76] The board's rules sought to exclude the groups through the elimination of anyone who might "criticize or denigrate" a particular career. In looking at the nature of the program, however, the court found that the program's discussion of career alternatives inevitably involved critical discussion of alternatives and that the rule was a "facade" to control valid points of view. The court ordered the groups' participation and further declared that the bulletin boards and guidance offices contained such a variety of materials as to make them open forums where any career-related materials, broadly defined, must be made available.

SANCTIONS FOR STUDENT MISCONDUCT

Student discipline cases involving suspension, expulsion, and corporal punishment appear in the sections that follow this one. Misconduct cases that do not involve these penalties are discussed here. Two such cases decided in 1988 involved the removal of students from the National Honor Society (NHS) and a third involved grade reductions for failing to attend after-school study sessions. The final case involved a singing cheerleader who claimed that she lost her right to an education when she was forced to graduate a semester early.

In the first NHS challenge, a school board affirmed a faculty decision that an unwed mother whom they found to have engaged in premarital sex should be removed from the group for violating the membership requirements of leadership and character. The student responded with a federal court suit alleging sex discrimination under title IX of 42 U.S.C. sections 1983 and 1985, claiming that unwed fathers had not been similarly dismissed. Fourteenth amendment equal protection arguments also were advanced.

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75. Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986), *modified and aff'd*, 815 F.2d 1389 (11th Cir. 1987). *See* The Yearbook of Education Law 1988 at 89.

76. Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988).

The district court concluded that the action could not be brought under title IX.[77] The court found that the school district received limited federal aid, in the form of school lunch program assistance and other categorical support. But no federal funds were used to support the school as a whole and therefore no federal dollars even indirectly were used for the NHS programs. The court did leave open the equal protection claims, however, concluding that the case was not ripe for summary judgment on those grounds. The court also urged the parties to avoid the "emotional hyperbole" that had characterized prior briefs in the case.

Students removed from the NHS for having formulas written on the bottom of their calculators during a calculus test appealed an unfavorable lower-court decision to a Florida appeals court.[78] The students had been explicitly instructed not to bring any formulas into the test room. It was clear in the case that the students had not consulted the formulas because each received a "0" grade. Nevertheless, the appeals court found no legal ground on which their expulsion from the group could be challenged, agreeing that they had "violated the spirit and intent" of the examination rules.

A Michigan school district with an unusual rule regarding after-school study sessions was the defendant in a case challenging the school board's authority to establish the policy.[79] Students who were absent from school in excess of three days a semester were required to attend after-school study sessions. Failure to attend resulted in letter-grade reductions. Even students with excused absences were subjected to the policy.

The plaintiff missed five days following a head concussion and failed to attend enough make-up sessions, resulting in diminished grades. The appeals court rejected arguments that the school lacked statutory authority to establish the policy, finding that students who were absent missed the "intangibles" of being in the classroom and that it was permissible to require students to have an alternative classroom make-up experience. Continuing this reasoning, the court also held that the plaintiff had no expectation of a higher grade, since classroom performance was a valid grading criterion and, therefore, could not claim that her grade had been "lowered."

In a case published two years after it was decided, a Kansas cheerleader claimed her rights were violated when she was removed from her position as head cheerleader and "forced" to graduate one semester early.[80] The student had received permission from school officials to

77. Pfeifer v. Marion Center Area School Dist., 700 F. Supp. 269 (W.D. Pa. 1988).
78. Jacob v. School Bd. of Lee County, 519 So. 2d 1002 (Fla. Dist. Ct. App. 1987).
79. Slocum v. Holton Bd. of Educ., 429 N.W.2d 607 (Mich. Ct. App. 1988).
80. Haverkamp v. Unified School Dist. No. 380, 689 F. Supp. 1055 (D. Kan. 1986).

journey to Nashville to record an album. Nevertheless, she was removed from her position as head cheerleader by the teachers who supervised the pep club. The district court hearing this unusual case refused to find that the student had a property interest at stake in her participation in extracurricular activities, citing the preponderance of case law on this point. The court then refused to hold that a hearing was necessary on her removal from the cheerleading squad.

In addition, the court declined to find that the school had violated the student's property rights by not allowing her to remain in school when she had sufficient credits to graduate. The court reasoned that her right to an education ended when she completed the graduation requirements. Other issues raised in the case similarly were dismissed.

Suspensions and Expulsions

Cases concerning exclusionary discipline generally involve both procedural and substantive claims. Courts that are called upon to decide whether students have received adequate procedural due process prior to their removal from school rely on the holdings in *Goss v. Lopez*.[81] *Goss* requires that students receive "oral and written notice of the charges against [the student] and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[82] For suspensions in excess of ten days, more due process is required. While school boards sometime fail to accord adequate procedural due process, especially before expulsion, substantive due process challenges attacking the rules themselves are almost never successful.

Cases in this area in 1988 continued a trend seen in recent years, with most resulting from actions taken against students accused of alcohol or other drug violations. In the cases presented at the outset, courts found procedural errors that nullified school actions.

In the most interesting of these cases, the Sixth Circuit overturned a district court decision and ruled that new evidence could not be introduced during the school board deliberations following an expulsion hearing.[83] The student was accused of possessing marijuana and of selling it to other students. Following the hearing, at which the student's attorney cross-examined school personnel, the superintendent presenting the case told the school board in closed session that a drug counselor had told him the student had confessed his guilt to her. The board then expelled the student for the remainder of the semester.

The drug counselor later submitted an affidavit that she had never

81. 419 U.S. 565 (1975).
82. *Id.* at 581.
83. Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988).

made the statement attributed to her by the superintendent. The appeals court held that this key piece of testimony by the superintendent was improperly presented to the board in closed session, where the plaintiff's attorney had no opportunity to rebut the evidence. The case therefore was remanded to the district court for further proceedings.

A student whose school principal would not readmit her until she submitted to corporal punishment brought suit in a Mississippi district court.[84] The student, who was wearing dark glasses contrary to school rules and refused to give them to the principal, initially was suspended for three days for refusing the paddling. Her suspension ultimately lasted for ten days, at which point the school board decided she should be readmitted if she remained another six days, to the end of the school term, in an isolation room within the school.

The issue before the court was whether the isolation room constituted a penalty similar to suspension, in which case the total length of the suspension would exceed ten days and the *Goss* requirement of additional due process would be triggered. The court was unable to reach a conclusion on this issue and on the plaintiff's argument that the school did not enforce the no-sunglasses rule against all students equally. The school district received a summary judgment from the court on all but these two issues, which were held for further arguments.

A rule about drinking "prior to" athletic events was at issue in an Arkansas case.[85] Students who admitted to sharing an alcoholic drink while driving to a football game challenged their one-semester expulsion on the ground that the rule was overly vague. The rule failed to define what "prior to" meant, and testimony by school board members about the rule elicited conflicting definitions, with one member claiming that it meant whatever the board wanted it to mean. This was too much for the court, which held that the rule was overly broad. Damages of $625 were awarded by a jury to each student.

A failure to state the charges prior to an expulsion hearing led an Illinois appeals court to overturn a lower-court ruling upholding the penalty.[86] The letter outlining the student's disciplinary problems was given to his legal counsel the night of the hearing, but did not contain any specific charges. The school board also refused a request for a continuation of the proceedings, unless the student remained out of school. The appeals court held that the student's record contained no information that supported the claim that he should not be in school and remanded the case with instructions that both the charge and the continuation request had been handled incorrectly.

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84. Cole v. Newton Special Mun. Separate School Dist., 676 F. Supp. 749 (S.D. Miss. 1987).

85. Claiborne v. Beebe School Dist., 687 F. Supp. 1358 (E.D. Ark. 1988).

86. *In re* Stratton, 526 N.E.2d 201 (Ill. Ct. App. 1988).

In the last of the cases involving procedural error, a Pennsylvania school district let a student finish his senior year final exams and then sought to expel him on commencement day. The student had been seen selling blotter paper laced with LSD. In spite of the fact that the charges seemed difficult to refute, the appeals court held that the student had a right to his diploma.[87] Pennsylvania law requires districts to issue a diploma to every student who completes the "prescribed course of study," which the student had done by the morning of graduation.

Two federal courts declined to hold that suspensions from school for short periods combined with removal from athletic teams for the rest of the season constituted a denial of substantive due process. In both cases, a court refused to find that a student has a property right that is implicated with dismissal from a sports team. In the first case, the student was suspended for five days and tossed off the baseball team for drinking on a class trip.[88] In the second, a student who had consumed beer and smoked marijuana at a student radio station was suspended for ten days and subsequently removed from the football team.[89] Both sets of penalties were held to be reasonable.

A Florida student challenged her expulsion on a variety of grounds, focusing on the letter she received charging her with possession of "what appeared to be" a marijuana cigarette. She unsuccessfully argued before an appeals court that the charge was overly vague.[90]

The Mississippi Supreme Court found that a student had received the "barest minimum" of due process in her expulsion for giving students Valium in school.[91] The record in the case indicated that the student, who had taken the drug from her grandmother, was expelled solely on the basis of testimony from other students, some of which conflicted. The court held, however, that there was sufficient evidence to support the expulsion.

Corporal Punishment

Corporal punishment in public schools has been held to be constitutional by the United States Supreme Court in jurisdictions where state law and local board policy permit.[92] The local policies establish the way in which the punishment is administered. Constitutional claims that excessive punishment violated a student's fifth or fourteenth amendment

87. Shuman v. Cumberland Valley School Dist., 536 A.2d 490 (Pa. Commw. Ct. 1988).
88. Katchak v. Glasgow Indep. School Sys., 690 F. Supp. 580 (W.D. Ky. 1988).
89. Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988).
90. Walter v. School Bd. of Indian River, 518 So. 2d 1331 (Fla. Dist. Ct. App. 1987).
91. Jones v. Board of Trustees of Pascagoula, 524 So. 2d 968 (Miss. 1988).
92. Ingraham v. Wright, 430 U.S. 651 (1977).

substantive due process rights are seldom successful, with courts instead directing plaintiffs toward filing state-court tort claims. The four corporal-punishment cases decided in 1988 all raised substantive due process claims, but only one was successful.

A sixth-grade student was hit twice with a paddle administered by a coach after he was found playing dodge ball when he had been told not to. The punishment was administered after two warnings and was meted out at the end of a recreation period in the presence of two witnesses. The student's doctor found no evidence of serious injury, but the student's father filed suit in federal court claiming a substantive due process violation. After a lower court issued a summary judgment in favor of the school system, the father appealed to the Eighth Circuit. The appeals court concluded that "minor discomfort and hurt feelings do not make a federal case," finding that there was no evidence that the punishment was inflicted with malicious or sadistic intent.[93]

"Snickering" kindergarten students were paddled twice, first by the principal and then by their teacher, when they refused to halt the behavior. After the second paddling they missed six days of school and suffered bruises that child welfare officers characterized as evidence of "child abuse." In spite of their injuries, the Fifth Circuit Court of Appeals refused to find that they suffered a violation of their substantive due process rights.[94] The appeals court felt bound by previous decisions in the circuit that held that state common-law remedies should be pursued when punishment is thought to be excessive.

The court also concluded it would not find the Texas law on corporal punishment to be unconstitutional, in spite of research presented by the plaintiffs that paddling was counterproductive and "irrational." The court held that the law had a rational basis and that calls for its repeal should be directed to the legislature.

Actions that involve the *ad hoc* administration of a punishment cannot be called "corporal punishment" simply because the intent is to control student behavior. In a case illustrating this point, a Pennsylvania student who was heard using inappropriate language during a physical education class was grabbed from behind by a gym teacher who then lifted the student in the air while keeping an arm across the student's throat. The student lost consciousness and suffered a broken nose and other serious injuries when the teacher released him and he fell to the floor.

A district court dismissed all the claims made by the student's parents. On appeal, the Third Circuit reversed, holding that the parent's

93. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988).
94. Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

substantive due process and state claims should be heard.[95] The appeals court concluded that a hearing might well lead to the conclusion that the treatment served "no disciplinary purpose." In dissent, one judge argued that not enough evidence of a constitutional violation had been presented and that state-court remedies alone should be pursued.

A Louisiana kindergarten student received a paddling from a vice-principal, and her parents later filed suit claiming that the penalty was excessive. In an unusual turn of events, the family's doctor testified that it was highly unlikely that the paddle had caused the bruise, concluding that it had come from a belt or stick. Under these circumstances, an appeals court concluded that it was not unreasonable for a lower court to dismiss the case.[96]

DESEGREGATION

Litigation involving desegregation continued to decline in volume in 1988, caused by rulings in previous years that school districts had attained unitary status and no longer required court supervision of outstanding injunctions or consent decrees. The cases that were decided in 1988 focused principally on two issues—the responsibility of states to pay enormous sums to remedy past segregation, and the claims by school boards that their districts should be removed from court supervision. A major case arguing attorneys' fees also was heard.

Cross-district Remedies

In a case of relatively recent inception, compared with most desegregation disputes that have a thirty-year history, the Second Circuit affirmed a lower-court decision ordering the Yonkers, New York, school board and the city of Yonkers to take steps to desegregate that city's schools.[97] The remedies required by the decision include the establishment of magnet schools, the construction of 200 federally funded public housing units outside existing minority neighborhoods, and payment by the city for the desegregation plan. In affirming the lower court, the appeals court found that the lower court had not erroneously concluded that both the city and the board were responsible for existing segregation.

The board had failed to address segregation on several occasions, even when presented with plans that would have done so. Likewise the city, which controls school budgets and the composition of the school board through mayoral appointments, failed to take action. While the defendants argued there had been no showing that racial factors were

95. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).
96. Abraham v. LaFayette Parish School Bd., 534 So. 2d 49 (La. Ct. App. 1988).
97. United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987).

the "dominant" factor in causing the governmental actions, the appeals court held that a finding that such motives were "significant" was sufficient. While the city and the board attempted to blame each other for the problem, the appeals court ruled that both were at fault.

The issue of which agency should pay for desegregation was argued in several cases heard by federal courts of appeal. In the first, the Sixth Circuit heard an appeal from a decision by a district court ordering Tennessee to pay 60% of Nashville's integration costs. While states traditionally are parties at the start of desegregation cases, Tennessee was added to this case in 1981, twenty-six years after the litigation commenced. In 1985, the district court concluded that the state had an obligation to pay the 60% share, starting in 1981 when the state was added as a party.[98] The state appealed, arguing that the principle of sovereign immunity precluded its liability.

The appeals court viewed the order for state payment through the lens provided by *Milliken v. Bradley*.[99] In *Milliken* the Court ordered state participation in funding a desegregation remedy, carving an exception to the doctrine of sovereign immunity by holding that federal courts could force state officials to conform to federal law even if the action had a substantial effect on a state's treasury. The appeals court concluded, however, that parallels between the role of the state in the Nashville case and that of the state in *Milliken* were quite different. In looking at the extent of Tennessee's involvement, the appeals court said it had "searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools had been wrongfully impeded by anything the state has done or has failed to do . . . ."[100] Finding no state wrongdoing, the court concluded that the lower court had strayed into an area reserved for elected representatives, and that its decision would "unilaterally rearrange the tax burdens of the people of Tennessee." The appeals court ordered the district court to dismiss the state as a party in the case.

The California legislature and a federal district court were at odds in a dispute involving payment for desegregation in San Francisco.[101] The original federal-court case ended when the parties signed a consent decree wherein the state agreed to fund 100% of the settlement costs. Subsequently, the legislature adopted a bill, characterized by the court as a "nearly incomprehensible statute," that established 1984-85 as a base

98. Kelley v. Metropolitan County Bd. of Educ. of Nashville, 615 F. Supp. 1139 (M.D. Tenn. 1985).

99. 433 U.S. 267 (1977).

100. Kelley v. Metropolitan County Bd. of Educ. of Nashville, 836 F.2d 986, 993 (6th Cir. 1987).

101. San Francisco NAACP v. San Francisco Unified School Dist., 695 F. Supp. 1033 (N.D. Cal. 1988).

year beyond which the state would fund only 80% of the increased cost for the plan. The court rejected the funding reduction, however, holding that the state had entered into a bargain with the parties and could not renege on its commitment. Since the state defendants in the case did not include the legislative branch, state education officials appealed the decision on the ground that they were unable to comply.

The Richmond school board in 1986 failed to convince a federal district court that the state of Virginia should fund remedial and compensatory education programs that the board argued were needed to eliminate the lingering effects of segregation.[102] The board appealed, asserting that the lower court had inappropriately placed the burden of proof on the board once it had concluded that the district had achieved unitary status. Once unitary status is achieved, the burden is on the plaintiffs to prove that official governmental action has contributed to segregation, or resegregation.

The Fourth Circuit Court of Appeals affirmed the district court ruling.[103] The district attempted to argue that the lower court should have expanded the six criteria found in *Green v. County School Board*,[104] the decision that courts follow in deciding if a district is unitary, to include such additional factors as test scores and dropout and graduation rates. The appeals court held, however, that these additional indices did not support the board's position. Looking at state data, the court concluded that students in the mostly black Richmond district did as well or nearly as well as those in other Virginia districts.

The contents of thirteen orders issued from 1986 through part of 1988 by the district court hearing the Kansas City desegregation case were reviewed by the Eighth Circuit.[105] The district court had concluded that the physical facilities in the district had "literally rotted" and had ordered the state to pay $150 million of the cost of the renovations.[106] The court also had ordered a property tax increase to pay desegregation costs in the district after several referenda to increase the levy had failed to get the necessary two-thirds vote, and assessed an income tax on persons who worked in Kansas City but who resided elsewhere. The state and a variety of *amici* parties submitted arguments appealing the sweeping lower-court orders.

The Eighth Circuit affirmed all but the income tax surcharge. The court rejected state claims that the building repair or construction plans

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102. Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986).
103. School Bd. of the City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).
104. 391 U.S. 430 (1968).
105. Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).
106. Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987). For a discussion of this and other reported decisions in the Kansas City dispute, *see* The Yearbook of Education Law 1988 at 101-2.

were excessive and failed to find that the district court had exceeded its authority in approving them or the magnet plan, which was the other key element of the lower-court decision. On the surcharge, which the appeals court observed had not seriously been proposed by any of the parties in the case, the Eighth Circuit found that the lower court had "invaded the province of the legislature" in ordering the remedy. The court went on, however, to order the state to pay any expenses for the desegregation plan that could not be raised by the school district. The liability of the state in this case flows both from its previous actions that promoted segregation and from state statutes that require extraordinary votes by the electorate to approve capital bonding and school levy increases.

Similarly controversial district-court orders were heard by the Eighth Circuit in the Little Rock desegregation case.[107] At issue were state funding of compensatory education programs, teacher assignments, school board elections, a court order finding the district to be in contempt for failing to implement a magnet plan, and a request that the district court judge be disqualified from the case. The appeals court addressed the disqualification motion first. Observing that requests to disqualify the judge had come from most of the parties in the case "at approximately the same times that the [d]istrict [c]ourt has ruled for their adversaries on the merits,"[108] the appeals court rejected the request. The court was troubled, however, with the fact that the judge had indicated that he would reject a student-assignment plan prior to holding a hearing on the subject.

The lower court was upheld on the remaining issues, including the variations to be permitted in racial goals established as part of the magnet plan and the question of state funding. While the school district was "technically" in contempt of court for failing to implement the plan speedily, the appeals court reasserted its support for the interdistrict remedy and affirmed a variety of lower-court orders that were designed to hasten its implementation.

As has been the case in recent years, a number of decisions were published in the St. Louis desegregation case. While the outline of a settlement had been agreed to in the long-standing dispute, involving partial state payment for interdistrict transfers to magnet schools and capital improvements, the parties appear to be unable to resolve any desegregation details without resorting to litigation. State funds provide the financial incentive for several county districts to participate in the regional plan.

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107. Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 839 F.2d 1296 (8th Cir. 1988).

108. *Id.* at 1302.

In the first case, Missouri sought to make no payment for interdistrict transfers in excess of the 25% enrollment goal set forth in the plan.[109] The district court concluded that the original goal set forth in the settlement, subsequently approved by the Seventh Circuit, was not intended to be precise, and that a 10% leeway should be allowed. The state was ordered to send the contested dollars to the six school districts participating in the magnet program.

In a separate case, the state objected to the granting of a time extension to one of the participating school districts so that it would have additional time to meet its majority-minority target ratio. The time extension had the effect of continuing the state's funding obligation for the additional period. The court found the state's objections to be without merit and approved a two-year extension.[110]

The St. Louis desegregation remedy includes both interdistrict and intradistrict magnet schools. Following remand from the Eighth Circuit which approved this general approach,[111] the district court in 1988 rendered a decision that specified in exacting detail how the desegregation plan should be implemented.[112] Of greatest interest in the case, the district court adjusted the funding formula for the magnets such that there would be an increased incentive on the parties to reach the target goals. The decision also addressed such details as the location of magnets and faculty-student ratios.

Finally, the Eighth Circuit addressed a minor issue in the protracted St. Louis case, affirming a lower-court decision that rejected attempts by the St. Louis NAACP to obtain resident student data from county school districts.[113] The data were sought to permit comparisons between the students who had transferred into the district as the result of the desegregation plan with those students who already resided there. The data were requested to support the contention that the transferring minority students were being treated differently from those who resided in the district. While affirming the lower court, the appeals court did remand the case so the district court could require that better data be supplied on the transfer students themselves.

Desegregation Plan Oversight

Cases involving the monitoring of desegregation by federal courts fall into three general groups. The most routine group of cases involves challenges to school system plans to modify a desegregation plan in

109. Liddell v. Board of Educ., St. Louis, 686 F. Supp. 235 (E.D. Mo. 1988).
110. Liddell v. Board of Educ., St. Louis, 687 F. Supp. 1368 (E.D. Mo. 1988).
111. Liddell v. Board of Educ., St. Louis, 801 F.2d 278 (8th Cir. 1986).
112. Liddell v. Board of Educ., St. Louis, 696 F. Supp. 444 (E.D. Mo. 1988).
113. Liddell v. Board of Educ., St. Louis, 851 F.2d 1104 (8th Cir. 1988).

some way, such as changing school assignments or constructing new facilities. Second, oversight litigation sometimes focuses on the question of whether a district has achieved unitary status and should be freed from court supervision. Finally, a smaller group addresses the issue of whether cases that have been closed should be reopened. All three types of cases were heard in 1988.

The standards and procedures that district courts use in deciding whether a system is unitary vary from circuit to circuit. The procedures must be followed, however, as was seen in the appeal of a decision made by a Louisiana district court. The district court had held that a system had attained unitary status, but issued the ruling on unitary status without holding a hearing. The plaintiffs in the case argued that the action was precipitous and the Fifth Circuit Court of Appeals agreed.[114] The appeals court reviewed its prior decisions that require three years of reporting by the school system to the district court about desegregation progress. A hearing then must be held on the motion for unitary status. Because these steps were not followed, the lower-court's action was reversed. The appeals court found no fault, however, with the lower-court ruling that the consolidation and construction plans proposed by the district should be approved.

The question of whether a school district can be declared to have reached unitary status while it still is under the control of previous court injunctions has been argued several times in recent years. The issue was raised again in a 1987 Oklahoma City desegregation case. In 1977, a district court ruled that Oklahoma City schools were unitary and the decision was not appealed. In 1985, the plaintiffs sought to reopen the case to argue that a pupil-assignment plan would lead to further segregation. The district court refused but the case was remanded by the Tenth Circuit.[115] The appeals court held that a system could not be unitary until the district court had dissolved the desegregation decree under which the school system was operationg. The appeals court also placed the burden of proof on the school board to show that its pupil-assignment plan was not in violation of the original desegregation decree.

The district court addressed these issues in an opinion handed down late in 1987.[116] After reviewing data showing that the district had seen a sharp increase in its enrollment of minority students over the seventeen years since the litigation commenced, the court weighed the question of whether the district's actions had contributed to increased segregation. The court concluded that residential segregation rather than board action was responsible. The court also held that the challenged assign-

114. Monteilh v. St. Landry Parish School Bd., 848 F.2d 625 (5th Cir. 1988).
115. Dowell v. Oklahoma City Pub. Schools, 795 F.2d 1516 (10th Cir. 1986).
116. Dowell v. Oklahoma City Pub. Schools, 677 F. Supp. 1503 (W.D. Okla. 1987).

ment plan implemented by the board for grades K-4 had provided parents with additional involvement with their local schools. The court ruled that the alternative proposed by the plaintiffs need not be considered because the schools had achieved unitary status. In other words, the failure of the court to dissolve the decree was seen as a technical oversight. The court, then, appeared not to follow the appeals court ruling that the burden of proof was on the school board in the remanded case. This approach provides the grist for a subsequent appeal of the decision.

Several 1988 cases argued pupil-assignment plans proposed by districts under court supervision. Parents of children who were denied a school transfer filed suit in North Carolina.[117] Minority children were given the opportunity to request transfers but majority pupils were not, thereby increasing desegregation in elementary schools. The parents of nonminority children claimed that the district's policy violated their equal-protection rights, but the district court held that the system had "broad discretion" in establishing policies that furthered desegregation. The court declined to consider whether the district had attained unitary status, concluding that its decision in the case at hand would be the same in either case.

The decision by the Fort Worth, Texas board to discontinue busing to achieve desegregation was heard by a district court.[118] In the thirty years since the case was initiated, Fort Worth schools have become increasingly filled with minority students, and busing has been reduced to cover only second and third graders enrolled in nineteen cluster schools. The busing involved schools at opposite ends of the city, with the longest rides taking more than three hours each day. While the end of busing would increase school segregation, the court found that the burden on children and parents was so great that the decision to stop the busing was not improper.

A district court decision approving a pupil reassignment plan in San Jose was approved by a California district court and the decision was appealed. The plaintiffs argued that the plan placed a disproportionate burden on minority children. The Ninth Circuit disagreed, however, finding that more than 90% of children from all races had been granted their first-choice request for the school they wished to attend.[119] The appeals court also refused to find that the plan had a disproportionate impact on minority children because a slightly greater percentage of minority children would be forced to attend their second-choice schools.

The use of achievement tests to place students was alleged to further

117. Pleasant v. Stanly County Bd. of Educ., 690 F. Supp. 1478 (M.D.N.C. 1988).
118. Flax v. Potts, 680 F. Supp. 820 (N.D. Tex. 1988).
119. Diaz v. San Jose Unified School Dist., 861 F.2d 591 (9th Cir. 1988).

school segregation in Starkville, Mississippi. The tests were used only for English and mathematics course sections in elementary schools. Student assignments in other subjects were made without using tests. The plaintiffs in the case argued that the test was resulting in a disproportionate number of one-race class sections. A district court ruled that the achievement grouping had only a "minimal segregative effect" and that the practice could continue. The plaintiffs appealed to the Fifth Circuit and the lower court decision was sustained.[120]

In a brief opinion, the appeals court concluded that actual student achievement, as opposed to hypothetical "ability" factors, could be used in making placement decisions that afforded better educational opportunities for all children. Similarly, the appeals court upheld the criteria used by the district to assign students to gifted and talented programs, wherein the student name, race, and grades were not known to judges who reviewed student work to determine who would be admitted.

The availability of minority-group teacher candidates was argued before the Eighth Circuit in a case originating in Nashville, Arkansas.[121] The case also involved claims of disproportionately severe treatment of minority students and segregation in school activities. When a district court rejected all of the plaintiffs' claims, an appeal was taken. The appeals court sidestepped the question of disparate treatment, agreeing that many of the plaintiffs' claims were left undisputed. The appeals court held, however, that it would render no finding on the matter, leaving it to the plaintiffs to petition the district court again if the practices became "onerous." On the failure of the distict to employ more minority teachers, whom the district argued were not available in the area, the appeals court remanded the issue to the district court for a determination of the relevant labor market. The appeals court hinted that the relevant market might include more than the candidates available in the immediate area.

Finally, in a baffling case that eventually led all parties in a desegregation dispute to join in fighting the federal government, the United States was unsuccessful in getting a federal court to declare that nine school districts had achieved unitary status.[122] There had been no activity in the litigation involving the districts since 1974, though permanent injunctions remained in effect. In 1988, however, in what the district court characterized as "an apparent effort to rid itself of inactive case files," the federal government filed a motion to have the systems declared unitary. Both the original plaintiffs and the defending school boards ultimately concluded that they would rather leave the injunctions

120. Montgomery v. Starkville School Dist., 854 F.2d 127 (5th Cir. 1988).
121. Scoggins v. Board of Educ. of Nashville, Ark., 853 F.2d 1472 (8th Cir. 1988).
122. United States v. State, 691 F. Supp. 1440 (M.D. Ga. 1988).

intact, rather than go through the expense of participating in court hearings on the unitary status motion. The district court concluded that the United States had status as an original participant in the case to make the motion, but the court held that the federal government would have to bear the entire cost of proving that each district had attained unitary status plus the cost of representing all nine unwilling school boards in the action.

State Court Cases

The Supreme Court of Kansas confronted the question of whether the Kansas Commission on Civil Rights had jurisdiction to investigate complaints involving alleged public school discrimination. The commission had been asked to investigate the student transfer policies in several school districts where it was alleged that the policies discriminated on the basis of race. A lower-court judge refused to enforce subpoenas issued by the commission and an appeal was taken.

For the Kansas high court, the issue was one of statutory interpretation.[123] The commission's powers applied to public accommodations, housing, and employment. While it had attempted to consider schools to be places of public accommodation, the court concluded that a clear reading of the statute led to the conclusion that only businesses could be places of public accommodation. The court therefore ruled that the commission had usurped legislative prerogative by attempting to expand its powers.

Attorneys' Fees

Attorneys' fees totaling more than $4 million in the Kansas City school desegregation case were disputed before the Eighth Circuit Court of Appeals.[124] When the dust settled, the district court's awards were left unchanged by the appeals court. An appeal has been made to the Supreme Court.

The state of Missouri contested the fee award, alleging that the plaintiffs had achieved only "partial success" and that hourly rates for attorneys had been improperly calculated. They also argued that the school board had responsibility for some of the fees, while the board in turn argued that it was entitled to fees from the state. The appeals court viewed the issue following the admonition in *Hensley v. Eckerhart*[125] that the fee issue should not result in a "second major litigation." In so

123. Commission on Civil Rights v. Topeka Unified School Dist., 755 P.2d 539 (Kan. 1988).
124. Jenkins v. Missouri, 838 F.2d 260 (8th Cir. 1988).
125. 461 U.S. 424 (1983).

doing, the court at several points announced that it might have reached a different conclusion, but that the action taken by the district court was not clearly erroneous. The fees covered the period from 1979 through part of 1986.

In sustaining the decision that the state must pay, the appeals court observed that the district had admitted its liability in the desegregation case, but that the state had denied its responsibility throughout a more than ten-month trial. The court also refused to upset the lower-court ruling that fees need not be divided among the parties in the same percentages as the cost for the desegregation plan implementation. While the plaintiffs argued that there should be a fee enhancement to reward them for litigating on a contingency basis, the lower court ruling denying this request was allowed to stand.